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JODIE L. KELLEY

DOCKET FILE COPY ORIGINAL

July 6, 1998

William F. Caton, Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

Re: In the Matter of Performance Measurements and Reporting Requirements for Operations Support Systems, Interconnection, and Operator Services and Directory Assistance, CC Docket No. 98-56, RM 9101

Dear Mr. Caton:

Enclosed for filing in the above-captioned proceeding please find an original and four copies of "Reply Comments of MCI Telecommunications Corporation." Also enclosed is an extra copy to be file-stamped and returned.

If you have any questions, please do not hesitate to contact me.

Sincerely,

Jodie L. Kelley

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of:	)	
	)	
Performance Measurements and	)	CC Docket No. 98-56
Reporting Requirements for Operations	)	RM 9101
Support Systems, Interconnection, and	)	
Operator Services and Directory Assistance	)	

REPLY COMMENTS OF MCI TELECOMMUNICATIONS CORPORATION

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Dated: July 6, 1998

EXECUTIVE SUMMARY

In response to the Commission's Notice of Proposed Rulemaking, every state public utility commission that submitted comments voiced support for the NPRM and the guidance the FCC has provided, as did numerous commenting CLECs and the General Services Administration. The ILECs stand alone in objecting even to performance reporting *guidelines*. Secure in the belief that they have already won the battle (that performance reporting will at most be governed by guidelines and not by binding rules) and the war (that regardless of reporting requirements, performance standards and adequate remedies are nonexistent due to inaction by both state and federal regulators), the ILECs are able to focus their comments on challenging details of the non-binding performance reporting guidelines. The ILECs' primary attacks on the proposed reporting guidelines are that:

1) the Commission has no authority to issue guidelines or rules because the agency charged with implementing the Act has no authority to interpret the Act or give meaning to the Act's requirement that ILECs provide unbundled elements, interconnection and resale on "reasonable" and "nondiscriminatory" terms;

2) although there is not a single example from a single interconnection agreement in any state in the nation, the state negotiation and arbitration process has been effective in establishing a full range of binding performance reporting requirements and performance standards;

3) the ILECs should not even have to gather or report data on particular measurements if there is some chance that under some circumstances they will have an explanation for a report showing discrimination;

4) some of the measurements would be too burdensome, based on fanciful "development" costs the ILECs pull out of thin air in their pleadings, without any substantiation or evidence of any kind (assertions that are squarely contradicted by Sprint, an ILEC that has a substantial interest in avoiding overburdensome reporting requirements); and

5) where ILECs allow for human intervention in processing CLEC orders, and discrimination is therefore most likely, performance reporting should be excused altogether.

As will be shown below, each of these arguments is without merit, as are the ILECs' objections to specific measurement methodologies and requirements.

Indeed, the ILECs' comments on performance reporting underscore the need for performance standards and self-executing remedies. Bell Atlantic and SBC concede, at last, that performance standards are required where there is no retail analog for particular functions ILECs provide to CLECs. And the ILECs' comments are littered with assertions that there are no retail analogs for a number of functions the Commission proposes to measure in the NPRM. Yet the fact remains that there also are no objective performance standards in place for any of these functions -- a fact that should, at a minimum, be dispositive of any section 271 applications the BOCs choose to file without effective performance standards in place.

Finally, although several parties comment on the appropriate statistical model to be used for determining whether ILECs have discriminated against CLECs, none offers any valid reason why the LCUG and MCI proposed "z test" should not be used. Application of the z test as outlined in Attachment C to MCI's Initial Comments will allow for an accurate determination whether discrimination has occurred. A finding of disparity using the z test must be deemed equivalent to a finding of unlawful discrimination because the Act prohibits discrimination

without qualification. There is no requirement that CLECs prove any particular degree of harm from discrimination, and any such requirement would be completely unworkable and would violate the Act.

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REPLY COMMENTS OF MCI TELECOMMUNICATIONS CORPORATION

INTRODUCTION

In response to the Commission's Notice of Proposed Rulemaking, every state public utility commission that submitted comments voiced support for the NPRM and the guidance the FCC has provided, as did numerous commenting CLECs and the General Services Administration. The ILECs stand alone in objecting even to performance reporting *guidelines*. The ILECs' primary attacks on the proposed reporting guidelines are that:

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why the LCUG and MCI proposed "z test" should not be used. Application of the z test as outlined in Attachment C to MCI's Initial Comments will allow for an accurate determination whether discrimination has occurred. A finding of disparity using the z test must be deemed equivalent to a finding of unlawful discrimination because the Act prohibits discrimination without qualification. There is no requirement that CLECs prove any particular degree of harm from discrimination, and any such requirement would be completely unworkable and would violate the Act.

I. THE COMMENTS CONFIRM THAT THE COMMISSION SHOULD EXPEDITIOUSLY ADOPT PERFORMANCE REPORTING REQUIREMENTS

In their comments, several incumbent LECs argue that the FCC should abandon this rulemaking altogether because, they claim, measurements are best negotiated or, as a last resort, arbitrated by state commissions, and that the FCC has no statutory authority to issue rules or guidelines with respect to performance measurements in any event. As set out below, the ILECs are flatly wrong with respect to each of these assertions. Their comments provide no basis for the FCC to fail to establish performance measurements but, instead, highlight why these measurements should be established as rules rather than guidelines.

A. Competitive Carriers Have Not Obtained, and Have No Meaningful Prospect of Obtaining, Meaningful Performance Measurements Through Negotiation and Arbitration

Several ILECs, including Bell Atlantic, GTE and Sprint, expressly recognize in their comments that it is appropriate for the Commission to establish performance measurements. See Comments of the Bell Atlantic Telephone Companies, CC Docket No. 98-56 (June 1, 1998) (Bell Atlantic Comments) at 1; Comments of GTE, CC Docket No. 98-56 (June 1, 1998) (GTE Comments) at 2; Comments of Sprint Corporation, CC Docket No. 98-56 (June 1, 1998) (Sprint

Comments) at 3.[1/] In sharp contrast, other ILECs argue that the Commission should dissolve this proceeding altogether and allow measurements to be established only through the negotiation and arbitration process, with no input from the Commission. See Ameritech's Initial Comments in Response to Notice of Proposed Rulemaking, CC Docket No. 98-56 (June 1, 1998) (Ameritech Comments) at 9-11; BellSouth Comments, CC Docket 98-56 (June 1, 1998) at 3; Comments of U S West Communications, Inc., CC Docket No. 98-56 (June 2, 1998) (U S West Comments) at 5-12. These ILECs offer no reasoned justification for the Commission to abandon its efforts to establish meaningful, comprehensive performance measurements. Instead, it is apparent from the comments that these incumbent LECs have been successful in avoiding the imposition of performance measurements, and are simply attempting to delay even further the establishment of any requirement that will make it more feasible for competitors to enter local markets.

Specifically, several ILECs argue that the Commission should not establish performance measurements because the Telecommunications Act indicates a preference for freely negotiated agreements, and the "give and take" of the negotiation process is the best forum in which to establish measurements. See, e.g. Ameritech Comments at 9-11; BellSouth Comments at 3; U S West Comments at 5-9. These ILECs are plainly wrong. Apart from the carrot of section 271 entry, incumbent LECs have no incentive to provide their would-be competitors with any contract term that will help advance competition, and competing LECs have no leverage to apply that would allow them to successfully negotiate these terms.[2/]

1/ SBC also generally supports performance measurements, although it suggests that they should not be adopted nationwide. See Comments of SBC Communications, Inc., CC Docket No. 98-56 (June 1, 1998), at i.

2/ As Commissioner Furchtgott-Roth notes in his dissenting statement: "In the best of worlds, decisions between . . . businesses and other businesses are not based not on regulatory

Although potential competitors have requested performance measurements, incumbent LECs have not voluntarily negotiated comprehensive performance measurements with exchange carriers who wish to compete in local markets. In fact, MCI is unaware of any instance in which an ILEC and a potential competitor were able to agree, during negotiations, on a comprehensive set of performance measurements.[3/] And, although the ILECs are long on the rhetoric of establishing measurements during negotiation, they are notably short on concrete examples.

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constructs but upon contracts." Dissenting statement at 1. MCI respectfully disagrees with this pronouncement in the context of ILECs contracting with CLECs. The local telephone industry is not, of course, the best of worlds. Instead, it is an environment dominated by monopoly providers which have, over decades and supported by taxpayer dollars, constructed the facilities needed to provide phone service. Unlike in a competitive environment, in this market potential competitors must rely on a sole provider in order to compete -- a provider who has every incentive not to enter into a contract, much less a fair contract, with those who would destroy its monopoly. As the Department of Justice has recognized, in this very context,

> Ordinarily, of course, we would not expect companies to assist competitors in taking away their customers. Thus, we believe that a successful Section 271 application must be premised on a system to measure wholesale performance effectively and to guard against any future deterioration in performance. . . . .

The Telecommunications Act of 1996, Moving Toward Competition Under Section 271, Hearings Before the Subcomm. on Antitrust, Business Rights and Competition, Committee on the Judiciary, 105th Cong. (March 4, 1998) (Statement of Assistant Attorney General Joel Klein).

3/ U S West's acknowledgment that "[o]riginal negotiations were quite contentious" is something of an understatement. U S West Comments at 6. U S West concedes that in the context of negotiations it has "pushed back" against providing any measurements that it claims it does not currently measure, that it believes are not required by sections 251 and 252, that it believes will be costly to implement, or that it believes will "increase contention regarding performance." Id. at 7-8. And, although U S West claims that it is now working with CLECs towards adoption of performance measurements, more than two years after the Telecommunications Act was passed it cannot point to a single instance in which it has actually done so. Id. at 6. Instead, it claims that these efforts have been successful, simply because would be competitors have the ability to raise the issue in state arbitrations, even if they never get results. Id. at 7 and n.9.

Indeed, in their comments, no ILEC points to a single instance in which they have voluntarily agreed, in negotiations with CLECs, to a complete set of comprehensive measurements.[4/]

Certain ILECs also argue that, in the absence of a negotiated agreement, performance measurements should be set only in the state arbitration process, with no guidance from the FCC. See, e.g., Ameritech Comments at 9-11; BellSouth Comments at 3-4; U S West Comments at 9-12. This argument is equally disingenuous. ILECs have repeatedly fought against the imposition of any performance measurements in state arbitration proceedings throughout the country.

And their efforts have largely been successful. In the wake of ILEC opposition and stonewalling, very few state arbitration proceedings have produced interconnection agreements that contain specific measurement requirements, and no arbitration proceeding of which MCI is aware has resulted in the adoption of a comprehensive set of measurements.[5/] Again, although

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4/ Some measurements and reporting requirements were imposed on Bell Atlantic, not in the context of negotiations or arbitrations, but as a condition of its merger with NYNEX. Bell Atlantic's response to this requirement is indicative of the degree to which incumbent LECs have fought the imposition of measurements and reporting: despite its agreement to do so, Bell Atlantic has refused to provide certain reports and the reports it has provided have been deficient.

SBC repeatedly refers to a letter in which it states its agreement with certain performance measurements recommended by the Department of Justice, as if to suggest FCC rules are therefore unnecessary. Reliance on the DOJ letter is particularly misleading, however, in light of the DOJ's very explicit statements that its recommendation left for another day nearly every critical issue concerning the effectiveness of performance reports, including 1) how each function should be measured (e.g., start and stop times); 2) disaggregation; 3) reporting intervals and formats; 4) data retention; and, 5) performance standards and benchmarking. Letter from Donald J. Russell, Chief, Telecommunications Task Force, U.S. Department of Justice to Liam S. Coonan, Esq., Senior Vice President and Assistant General Counsel, SBC Communications, Inc., March 6, 1998 (Exh. B).

5/ A few states have opened separate dockets to set performance measurements, as noted by MCI, AT&T and others in their opening comments. See, e.g., Proceeding on Motion to Review Service Quality Standards for Telephone Companies, Case No. 97-C-0139 (New York); Order

long on rhetoric regarding the ability of the arbitration process to produce meaningful measurements, the ILECs are unable to offer any concrete examples.[6/]

Moreover, the ILECs' claim that establishment of measurements would interfere with the state arbitration process is squarely at odds with the positions of the states themselves: the comments make clear that states are looking to the FCC for guidance on the appropriate measurements to be set. Not only has NARUC urged the Commission to provide guidance on measurements and reporting, see NARUC Convention Floor Resolution No. 5, "Operations Support Systems Performance Standards" (Nov. 1, 1997), every state commission filing comments in this docket has supported the FCC's efforts to establish performance measurements, at least through guidelines. See Comments of the Michigan Public Service Commission, CC Docket No. 98-56 (June 1, 1998) (Michigan Comments) at 3 ("The Michigan Public Service

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Instituting Investigation on the Commission's Own Motion Into Monitoring Performance of Operations Support Systems, Case No. 1.97-10-017 (California); Performance Measurements for Telecommunications Interconnection, Unbundling and Resale, Case No. 7982-U (Georgia); In re Commission Investigation into Procedures and Methods necessary to Determine Whether Interconnection, Unbundled Access, and Resale Services Provided by Incumbent Local Exchange Carriers are at Least Equal in Quality to that Provided by the Local Exchange Carrier to Itself or to Any Subsidiary, Affiliate, or any Other Party, Docket No. 97-9022 (Nevada). Even if those proceedings were completed expeditiously, and even if adequate measurements were established in each of these states, potential competitors would still be faced, in the vast majority of states, with no adequate measurements whatsoever. The incumbent LECs do not, and cannot, dispute this. Contrary to the dissenting statement of Commissioner Furchtgott-Roth, this -- together with the ILECs' failure to cite a single agreement with comprehensive performance requirements -- provides compelling "evidence with respect to OSS that the process of negotiating private contract with State arbitration under Section 252 is not working."

6/ In its comments, the Michigan Commission noted the absence of meaningful measurements and standards in interconnection agreements, observing that existing interconnection agreements "appear to be more theoretical than practical," and that even in those agreements in which performance is addressed in some way, "[a]s parties to those agreements begin to implement the various features of the interconnection agreements, they are finding often performance related provisions are ether ill-defined or not defined at all." Michigan Comments at 5.

Commission (Michigan) welcomes and applauds the Federal Communications Commission's (FCC) effort to provide more clarity and substance to the process envisioned by the Telecommunications Act of 1996 (FTA) Sections 251 and 271."); Comments of the Washington Utilities and Transportation Commission, CC Docket No. 98-56 (June 2, 1998) (WUTC Comments) at 4 ("[W]e endorse the proposal to establish model, non-binding operations support system performance measurements and reporting requirements."); Comments of the Public Utilities Commission of Ohio and the Staff of the Public Utilities Commission of Ohio, CC Docket No. 98-56 (May 28, 1998) (Ohio Comments) at 3; Letter from State of New York Department of Public Service in CC Docket No. 98-56 (May 29, 1998) (NY Comments) at 1; Comments of the Public Utility Commission of Texas on the Commission's Proposed Rulemaking on Performance Measurements and Reporting Requirements for Operations Support Systems, Interconnection, and Operator Service and Directory Assistance, CC Docket No. 98-56 (May 26, 1998) (Texas Comments) at 9-10.

In short, those incumbent LECs that argue that the FCC should not establish performance measurements because such measurements can and will be established during the negotiation and arbitration process are simply wrong. This has not occurred to date, and there is little prospect that it will occur in the foreseeable future absent direction from the Commission. Indeed, even those states that have recognized the importance of measurements and reporting, and that are attempting to establish such requirements, have recognized that it would not only be appropriate but would be helpful for the Commission to establish performance measurements.

B. There is no Jurisdictional Bar to the Establishment of Performance Reporting Requirements, Standards, and Enforcement Mechanisms

In their comments, some incumbent LECs attempt to argue that the Commission has no jurisdictional authority to establish performance requirements. See, e.g., Ameritech Comments at 6; BST Comments at 2-5. This argument is specious. As MCI, AT&T and others demonstrated in their opening comments, the Commission has ample jurisdiction to adopt either binding rules -- which MCI strongly believes would be most appropriate -- or model performance requirements.

Section 251 of the Act expressly directs the commission to establish regulations to implement the requirements of that section. 47 U.S.C. § 251(d)(1). In the Local Competition Order, the Commission issued its first set of regulations implementing section 251's requirements, including regulations that set out some of the terms and conditions under which incumbent LECs must provide access to their OSS. See, e.g., 47 C.F.R. § 51.319(f) (requiring ILECs to provide nondiscriminatory access to operational support systems, including "pre-ordering, ordering, provisioning, maintenance and repair, and billing functions . . ."; 47 C.F.R. § 51.313(b)-(c) (requiring ILECs to provide "pre-ordering, provisioning, maintenance and report, and billing functions" of OSS at parity); see also Local Competition Order ¶ 525 (requiring incumbents to provide nondiscriminatory access to their order processing systems "no later than January 1, 1997").

These regulations, and other regulations implementing section 251, were upheld by the Eighth Circuit in Iowa Utilities Board v. FCC, 120 F.3d 753 (8th Cir. 1997). Indeed, the Eighth Circuit specifically held that the Commission is authorized to set forth the "network elements [that] should be made available for purposes of subsection (c)(3)," id. at 802 n.23, and upheld the

regulations set forth above which dictate the terms and conditions under which such elements must be provided. Thus, far from casting doubt on the Commission's jurisdiction to implement regulations that define the terms and conditions under which access to OSS must be provided, the statute itself and the Eighth Circuit's decision highlight the authority unquestionably held by the Commission.

Nonetheless, in its comments Ameritech argues that the Commission has no jurisdiction because "section 251(c)(3) does not even mention this Commission." Ameritech Comments at 8. This inexplicably ignores, of course, section 251(d)(1), which not only mentions the Commission, but directs the Commission to establish regulations implementing the requirements of, among other sections, section 251(c)(3). This also ignores the Eighth Circuit's decision upholding the Commission's authority to establish those very regulations.

Ameritech also argues that the Commission lacks jurisdiction because the Act directs state commissions to arbitrate and approve interconnection agreements. Ameritech Comments at 9 (arguing that performance measures "relate to the 'terms and conditions' of an incumbent's provision of resold services, unbundled network elements or interconnection," which go "hand in hand with 'agreements' -- a subject left to private negotiation, State arbitration, and federal court review . . ."). In essence, Ameritech argues that any regulation that constrains the state in arbitrating under the Act is unlawful. That, however, is simply and obviously wrong.

Although the Act directs state commissions to arbitrate and approve interconnection agreements, it also expressly requires that, in doing so, state commissions ensure that the resolution of arbitrable issues, and the conditions imposed, "meet the requirements of Section 251, including the regulations prescribed by the Commission pursuant to Section 251."

47 U.S.C. § 252(c)(1) (emphasis added). The Act itself thus plainly contemplates that the Federal Communications Commission will establish regulations pursuant to which the state arbitrations will be conducted, and that the states will arbitrate in accordance with those regulations. As noted above, the Commission has already established a number of regulations and states have conducted arbitrations pursuant to those regulations. This exercise of authority was upheld in all relevant respects by the Eighth Circuit. Notably, in its comments Ameritech does not mention the Eighth Circuit decision, presumably because it confirms what the Act makes clear -- the Telecommunications Act provides the FCC more than ample jurisdiction to set the terms and conditions under which ILECs must make unbundled network elements, including OSS, interconnection and resale available. At bottom, Ameritech confuses the issue of interference with the arbitration process with the very different issue of the Commission's unquestioned authority to establish positive law, pursuant to the Act, that must be applied during the arbitration process.

C. The Comments Confirm that the Commission Should Establish Rules, not Guidelines

A number of commenters, including Sprint and AT&T, highlight the propriety of establishing rules as opposed to non-binding guidelines. Even the comments of those who oppose rules, however, make clear that binding rules are appropriate.

For example, although GTE advocates model guidelines instead of rules, it correctly notes the benefits of national uniformity that will accrue only with binding rules. The adoption of a single set of minimum measurements, GTE notes, will benefit ILECs, allowing them "to develop similar performance and reporting capabilities within their multi-state networks." GTE

Comments at 3.[7/] By contrast, "[i]f each state were to adopt completely unrelated performance measures and reporting requirements, ILEC system programming and distribution costs would increase substantially." Id. GTE goes on to note that the development of uniform measures will also benefit CLECs "because they will receive relatively similar data from ILECs in many states." Id. As GTE tacitly acknowledges, without uniformity CLECs will have little or no ability to make comparisons of a single ILEC's performance from state to state, much less a comparison of the respective performance of different ILECs.[8/]

Adoption of non-binding guidelines will not ensure that they will not be challenged by the incumbent LECs. That the ILECs will aggressively argue against the adoption of these measurements in individual interconnection agreements -- making it more unlikely that state commissions will be able to expeditiously establish performance requirements -- is abundantly clear from the ILECs' comments. See, e.g., Ameritech Comments at 13 (arguing that the proposed measures are "merely a series of non-binding 'talking points' for further regulation and litigation at the state and federal levels"), see also id. (claiming that the measurements are "meaningless make-work"). Thus, MCI fears that if the Commission chooses only to adopt guidelines it will quickly find that, due to protracted challenges by the ILECs, coupled with the limited resources of state commissions, the proposed measurements will be implemented in very

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7/ This is not to suggest, of course, that the rules would be inflexible. As with the regulations already established by the FCC, states would remain free to impose additional measurements and reporting requirements as they deem appropriate.

8/ The Michigan commission similarly noted the importance of establishing "performance measurements and standards which should be reasonable and predictable across the national telecommunications marketplace." Michigan Comments at 3. This uniformity cannot be achieved without rules that are national in scope.

few states leaving potential competitors with little or no help in an area in which help is desperately needed.

The ILECs' comments provide another, related reason that rules should be adopted. A number of ILECs argue that the very prospect of non-binding guidelines creates great "confusion" that will result in endless litigation. See, e.g., U S West Comments at 17 (the detail included is inconsistent with guidelines, and this "is certain to result in legal challenges, should the Commission determine to proceed under the framework it proposes"); id. at 21 (arguing that the "procedural strangeness" of the proceeding is "certain" to "lead to further litigation if promulgated"); see also Ameritech comments at 11-14. It is thus abundantly clear that the ILECs plan to further delay any state commission use of these guidelines by bringing legal challenges because the Commission plans to adopt guidelines instead of rules. Although this "concern" is specious, such litigation will certainly create further delay. Because it is abundantly clear that the ILECs will challenge any performance requirements established by the Commission, there is no reason for the Commission to hesitate to adopt binding regulations.[9/]

D. The Commission Has Properly Recognized the Importance of Performance Reporting and Standards to the Section 271 Evaluation Process

Some BOCs argue that the Commission cannot adopt performance requirements that it will use in considering section 271 applications because such requirements might conflict with performance requirements set by the states. See, e.g. Bell Atlantic Comments at 4; BellSouth Comments at 7; U S West Comments at 20. This argument is flatly inconsistent with the requirements of the Act.

9/ Because the need for measurements is so urgent, MCI strongly supports the adoption of measurement guidelines if rules are not adopted. Based on its history in this area, however, MCI remains convinced that rules are needed, and are needed immediately.

Under section 271 it is this Commission, and only this Commission, that is charged with making the final decision whether a requesting BOC has met the requirements of that section. Although the Commission is charged with consulting with the states in making this determination, see § 271(d)(2)(B), the Commission has properly interpreted the clear language of the Act in concluding that the views of state commissions are entitled to no particular deference in section 271 proceedings -- let alone that the views of state commissions are dispositive in any way. In the Matter of the Section 271 Application of BellSouth Corporation to Provide In-Region, InterLATA Services in South Carolina, CC Docket No. 97-231, Memorandum Opinion and Order (December 24, 1997) (South Carolina 271 Order) ¶ 29. Indeed, if the FCC disagrees with the recommendation of a state commission and concludes that a BOC has not met the competitive checklist of section 271 (for example, because the BOC has failed to provide adequate access to unbundled elements, including OSS), the Commission is bound by statute to deny the application.

The Commission has properly emphasized that section 271 requires not only that local markets are open at the time of an application, but also that safeguards are in place to ensure that local markets will remain open after 271 entry. In the Matter of the Section 271 Application of Ameritech Michigan to Provide In-Region, InterLATA Services in Michigan, CC Docket No. 97-137, Memorandum Opinion and Order (August 19, 1997) (Michigan 271 Order) ¶¶ 386, 390-94. And the Commission has specifically noted that effective performance standards and remedies are the means to help ensure that local markets remain open after Section 271 entry. Michigan 271 Order ¶¶ 390-94. Thus, as Chairman Kennard has testified,

> The Commission will consider whether the BOC has agreed to performance monitoring and whether there are appropriate enforcement mechanisms that are sufficient to ensure compliance with established performance standards.

The Telecommunications Act of 1996, Moving Toward Competition Under Section 271, Hearings Before the Subcomm. on Antitrust, Business Right, and Competition, Committee on the Judiciary, 105th Cong. (March 4, 1998) (Statement of FCC Chairman William Kennard).[10/]

Establishment of performance requirements by the Commission will also aid, rather than hinder, states in performing the function section 271 of the Act charges them with carrying out, by providing states with meaningful performance measurements against which to measure an ILEC's performance. In its comments, the Michigan Public Service Commission highlights this, noting that in "its consultative role in two applications by Ameritech Michigan pursuant to Sec. 271 . . . it had little information available on Ameritech Michigan's OSS system." Michigan Comments at 3. This made it extraordinarily difficult to assess Ameritech's application -- the state "clearly determined that without some system of measurements and standards related to nondiscriminatory access to OSS and other network elements, it would be difficult, if not impossible, to ultimately judge whether an 'efficient competitor (has) a meaningful opportunity to compete.'" Id. at 4. For this reason, among others, the Michigan commission "welcome[d] and applaud[ed]" the NPRM. Id. at 3.

II. THE ILECS' COMMENTS FURTHER UNDERSCORE THE NEED FOR THE COMMISSION TO ESTABLISH OBJECTIVE PERFORMANCE STANDARDS

It is a matter of public record that the ILECs have successfully resisted performance standards and self-executing remedies as part of the negotiation and arbitration of

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10/ MCI agrees with Chairman Kennard. Enforcement mechanisms are critical to ensuring compliance with these standards. As such, MCI strongly urges the Commission to provide guidance for enforcement mechanisms as well.

interconnection agreements. Not one party submitting comments has produced evidence of a single interconnection agreement with even a minimally adequate set of objective performance standards and self-executing remedies. The ILECs' reasons for resisting performance standards and effective remedies are crystal clear: Performance reporting alone does nothing more than state after-the-fact whether an ILEC has provided discriminatory service to CLECs. The ILECs know full well that a CLEC cannot file a new enforcement action each time a customer is lost due to ILEC discrimination, or even every month based on consistent data showing discrimination and poor performance. To do so would require an enormous expenditure of resources, with an uncertain prospect of a remedy sufficiently severe and timely to give the ILECs incentive to cooperate with their CLEC competitors.

More importantly, there is no chance of state commissions issuing timely decisions that would deter ILEC discrimination *when there are no standards to guide the states*. That is why, for example, the Michigan Commission noted the importance of both measurements and standards to its efforts to assess whether CLECs have a meaningful opportunity to compete. Michigan Comments at 4. Absent such standards, at the end of each month a state commission will be faced with a pile of reports with highly technical explanations by ILEC-paid statisticians explaining why no conclusion can be drawn from the data. Although there can be no valid excuse for a lack of parity once proper statistical techniques are applied to establish statistically significant results, that will not deter the ILECs from arguing to the contrary and muddling the record before state commissions. Clearly defined performance standards that the parties can apply on their own without the need for constant litigation, and which state commissions and courts can apply on the rare occasion when self-executing remedies are not in place or are

The solution to this gaping hole in the implementation of the Act is for the Commission to establish minimum performance standards that allow CLECs a "meaningful opportunity to compete." If the Commission is unwilling to do so, it should, at a minimum, establish guidelines for effective performance standards and self-executing remedies, as MCI noted in its Opening Comments. Finally, having correctly acknowledged the importance of performance standards and remedies to prevent backsliding by BOCs following 271 entry, the Commission must stand by its consistent statements on the importance of standards, and the ILECs' acknowledgment of the need for standards, by denying section 271 applications unless adequate performance standards and remedies are in place.

III. THE ILECS' OBJECTIONS TO PARTICULAR MEASUREMENTS OR REPORTING REQUIREMENTS ARE WITHOUT MERIT

Although nearly every measurement the Commission proposed was accepted by at least one ILEC,[12/] the ILECs took issue with a number of details of particular measurements or reporting requirements. MCI believes that for the vast majority of measurements, the LCUG document attached as Exhibit A to MCI's Initial Comments fully explains the reasons for the requisite measurement methodology and level of disaggregation and MCI therefore does not respond in these reply comments to each objection. Instead, MCI responds below to some of the recurring themes in the ILECs' comments that merit additional discussion, with an emphasis on the comments of Ameritech, which presented the most voluminous discussion of individual measurements.

12/ Attached as exhibit A is a table MCI prepared showing which of the proposed measurements were supported, in full or in part, by at least one ILEC.